United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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75-1348

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

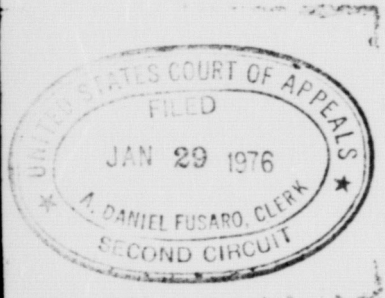
against

JOSEPH BUGLIARELLI,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC



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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

This is a petition by defendant-appellant, Joseph Bugliarelli, for a rehearing *en banc* of the judgment of affirmance hereon on January 19, 1976. This petition is respectfully addressed to Hon. J. Edward Lumbard, Hon. J. Joseph Smith and Hon. Walter R. Mansfield, the panel which decided this appeal.

This petition for rehearing *en banc* is filed because of the importance of the issues both constitutionally and in the administration of the federal criminal law pertaining to Internal Revenue administrative procedures which are present in this case.

Since no decision was filed by the lower court or this Court, we believe the effect of the non-decisions in this case will permit the Government to continue to proceed in

violation of the decisions of not only this Court but of the Supreme Court of the United States.

At the outset, the fact that the jury had trouble reaching a verdict, having deliberated from 12:00 o'clock in the afternoon to 2:00 o'clock the following morning indicates that to them, at least, the case was not "open and shut".

Twenty-five years ago when the net worth method of proving understatement of taxes was first examined in the Supreme Court the Court concluded: "[I]t is so fraught with danger for the innocent that the courts must closely scrutinize its use" (*Holland* v. *U.S.*, 348 U.S. 121, 125).

But the admonitions and the cautions that were painstakingly formulated with precision and specificity have been either verbalized away or else completely disregarded in the present case. Here an arbitrary assumption regarding the essential element of opening currency on hand (that many Circuits have rejected even in civil deficiency cases) starts with the presumption that the Commissioner is right and the taxpayer wrong. Here the presumption has been permitted to supply vital proof in a criminal case, where the proper presumption is that the taxpayer is innocent and, therefore, right. The result is the present criminal trial where the approval and approbation of the court below and this Court has been turned in substance and effect, into a "show cause" proceeding where the accused person must himself come forward at his trial to supply items of evidence essential to the prosecution's case, and ultimately, to establish his innocence.

"We agree with petitioners" the Supreme Court stated in *Holland* at 132.

> "That an essential condition in cases of this type is an establishment with reasonable certainty of an opening net worth to serve as a starting point from which to calculate future increases in the tax-

payer's assets." *Accord. Smith v. U.S.*, 348 U.S. 147, 155.

This "essential condition" is noticeably absent here. Passing the point that the prosecution's investigation of cash and currency on hand had been of a most sketchy nature, it is apparent from this record that the prosecution failed in its:

> "duty . . . of approaching the problem fairly and open-mindedly as a question of getting at business or economic reality, regardless of the fact that the taxpayer may be a revenue delinquent . . ." *Gunn v. Commissioner*, 247 F2d 359, 362 (C.A. 8).

Instead, the approach of the prosecution was that of "heads — we win, tails — you lose". The petitioner was shown to be engaged in gambling — "an occupation with indeterminate possibilities" *U.S. v. Costello*, 229 F2d 668, 672 (C.A.2) affirmed on other grounds 350, U.S. 359, *but the appellant was not credited with a single penny in currency at the beginning of the net worth period, namely, January 1, 1970.*

The prosecution made much of the defendant being involved in gambling and, in fact, they knew he was involved in gambling. On page 31 of the Brief filed in this Court, the Government stated in a footnote that there was evidence available that the defendant had "ten gambling arrests between 1962 and 1969 and the February, 1972 arrest". Therefore, all of the evidence points to the fact that petitioner's cash-on-hand was substantial at the starting point of computation in view of his prior gambling activities. Gambling (quite as much as purchase of produce from farmers; see *Gunn v. Commissioner*, 247 F2d 359, *supra*), requires currency on hand; and here there was no real countervailing evidence. Defendant-appellant had not lived a life of penury or privation, as in *Holland v. United*

States, 348 U.S. at 133 and *Friedberg v. United States*, 348 U.S. 142, 144. There was no proof that he ever had obligations to go unpaid, as in *U.S. v. Costello, supra*, 221 F2d at 672-673. Lastly, in view of (according to the Government) his proven occupation of gambling, there was obviously an inherent probability in his having had large sums of currency on hand at the beginning of the period.

In any event, in a net worth case, seeking to prove unreported income in the years 1970 and 1971, the prosecution can hardly rely on the defendant to supply evidence of currency on hand by testimonial admissions to the effect that he may have violated Section 7201 in earlier years on which he was not indicted.

The approach in this case was using the revenue agent technique, giving no credit whatever of currency on hand simply because no effort at ascertainment of currency on January 1, 1970 was ever made. This bold assumption that "X" equals "O" has been consistently rejected by the Courts in decisions rendered subsequent to the guidelines ruling here in *Holland v. United States*, 348 U.S. 121.

Statements made by defendant, even assuming they were admissible, deal with cash that was on hand *not* on December 31, 1969 but generalized questions as to whether anyone had even given him any money or where he kept his money in 1972. It is true that the jury rejected the testimony of a witness that claimed that there was a cash hoard of $53,000 that had been given to defendant by his brother, but in order for the Government to establish its case the essential condition is the establishment of an opening net worth and since the Government knew that he was in the gambling business (by their own admission) it was their duty to have investigated the extent of his gambling operations during that period of time.

What is primarily significant here, however, is that the Government gave no effect whatever to do what the Supreme Court had solemnly declared to be a necessary safeguard in net worth cases, namely, the prosecution's duty to track down relevant leads — here not a fanciful pursuit — but gambling over a further period of time between 1965 and 1969, not just the two years involved in this case.

The prosecution stated that certain income was realized in the years 1970 and 1971 because of certain expenditures in 1971 and 1972. It is sheer speculation for the Government to say that he only earned what was spent in the year 1970 and that there was *no more money* earned in 1970 that was spent in the year 1971. It is folly for the Government to say that in the years 1965 through 1969, when defendant was involved in the gambling enterprise by the Government's *own admissions*, he did not have any cash on hand to account for the expenditures of 1970 and 1971 over and above the reported income for those years. This involves "a mathematical artificiality". *Gunn v. Commissioner, supra.* 247 F2d at 364. The burden of proof in a criminal case should not be shifted to the taxpayer. See Duke, *Prosecutions For Attempt To Evade Taxes.* 76 Yale L.J. 1 (1966).

CONCLUSION

We submit with deference that a hearing *en banc* should be granted in order to resolve these fundamental issues.

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Defendant-Appellant

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Jan. , 19 76 at No. 1 St Andrews deponent served the within Petition upon Asst Dist Attorney the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 29 day of Jan 19 76

Edward Bailey

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Edward Bailey

William Bailey
.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976